

David Orden and Lars Brink, *Revising the WTO Measurement of Agricultural Price Support to Resolve the Impasse on Public Stockholding*  
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## REVISING THE WTO MEASUREMENT OF AGRICULTURAL PRICE SUPPORT TO RESOLVE THE IMPASSE ON PUBLIC STOCKHOLDING

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*This article addresses the measurement of market price support (MPS) under the World Trade Organization (WTO) Agreement on Agriculture (AoA) and the stance of India and many other developing countries that exception from any limit on producer support be allowed for their acquisition at administered prices of public stocks for food security purposes, known as Public Stockholding (PSH). This position has been opposed by some agricultural exporting countries and the disagreement has contributed to an ongoing impasse in WTO negotiations, including at the recent 2022 Ministerial Conference. The article argues that there are problems with the AoA's MPS measurement and that revising the formula for the same should be considered as a way to break the impasse on public stockholding. The revised calculation would reduce the AoA MPS in many cases and bring it closer to an economic measurement of support. Thus, India and other developing countries could accept continued disciplines that would not be as onerous as with the current measurement. In short, there is fault on both sides in the PSH deadlock.*

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### I. INTRODUCTION TO THE PUBLIC STOCKHOLDING IMPASSE

One of the innovations in the agreements adopted with the 1994 establishment of the World Trade Organization (WTO) was the inclusion of disciplines on domestic support alongside disciplines on border measures in the Agreement on Agriculture (AoA or Agreement).<sup>1</sup> However, the nature of those disciplines and their uneven impact across WTO members have been a source of continuing controversies. One controversy has concerned the acquisition of public stocks for food security purposes. Under the AoA, the expenditure a government incurs on acquiring such stocks at market prices is exempt from limit.<sup>2</sup> The expenditure of a developing country's government on acquiring stocks at administered prices can also be exempt from limit if a calculated price gap is accounted for in the AoA's Aggregate Measurement of Support (AMS), which is subject to limit. India and some other developing countries have long argued that the price-gap-based component of support should not, when related to the acquisition of food security stocks, enter the AMS or if it does and AMS exceeds its limit, the excessive producer support should not be disputed. Other members consider that a situation where the price-gap-based component makes AMS exceed the Agreement's limit could be a matter for dispute settlement.

As elaborated in this article, we find fault with both arguments. Developing countries have the flexibility under the AoA to be exempted from limit on many investment and input subsidies. Effectively exempting price support as well would mean that neither input subsidies nor output price support for major crops in developing countries would be subject to limit — essentially leaving producer support policy unconstrained. This is inconsistent with the long-term objective of the AoA to establish a fair and market-oriented agricultural trading system, with strengthened and operationally effective rules and disciplines, and to provide for substantial progressive reductions in agricultural support and protection resulting in correcting and preventing restrictions and distortions in world agricultural markets. At the same time, rigid application of the Agreement's formula for calculating market price

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<sup>1</sup> Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 410 [hereinafter AoA].

<sup>2</sup> *Id.* Annex 2.3.

support (MPS) often results in measured MPS that far exceeds the economic price support being provided, which depends more flexibly on differences between current domestic and world market prices. This discordance can, given a member's WTO obligations, severely constrain its economic policy choices.

As a solution to this impasse, this article proposes a modification of the MPS formula under the AoA. The modification would calculate the price gap as the difference between the administered price and a reference price based on recent lagged world prices instead of world prices from the fixed period of 1986-88, i.e., thirty-five years out-of-date for original WTO members. Using a lagged moving average reference price would bring the measurement of MPS under the AoA more closely into alignment with the economic price support that matters for world markets. This would improve the rules for all members. In many cases, the MPS of developing countries would be smaller than measured under present rules. Including a smaller MPS in AMS would make it easier to comply with AMS limits when using administered prices to acquire stocks for food security purposes. There is, thus, a sensible technical fix that could ease the impasse over producer support related to food security programmes if flexibility on the part of all participants were forthcoming so as to allow a pragmatic solution consistent with the objective of the AoA.

To understand these issues, the article is organised as follows. Part I above has provided a general introduction to the impasse situation. In the upcoming portion, Part II provides a thumbnail sketch of the disciplines on domestic support under which the stock acquisition issue arises. The Agreement's and economic measurements of MPS are elaborated and different interpretations of calculating the price support subject to limit are illustrated for India. The negotiations around producer support and stock acquisition for food security purposes, known commonly as Public Stockholding (PSH), are reviewed in Part III. This includes the current interim agreement that, under certain conditions, a developing country's excessive producer support cannot be challenged through dispute settlement when arising from MPS under PSH programmes. The impasse in finding a permanent solution on this issue at the WTO Ministerial Conference in 2022 is also reviewed. The lagged moving average measurement as a means to improve the Agreement's disciplines on support is introduced in Part IV. Finally, conclusions on this as an avenue to alleviate the impasse on PSH are highlighted in Part V.

## II. DOMESTIC SUPPORT RULES

The rules in Article 6 of the AoA, titled 'Domestic Support Commitments', divide support measures in favour of agricultural producers into three distinct categories

and a residual category.<sup>3</sup> The categorisation resulted from the need to accommodate the interests of influential countries in the 1986-94 Uruguay Round of negotiations under the General Agreement on Tariffs and Trade (GATT) in combination with economic considerations in relation to the objective and purpose of the AoA.

The AoA exempts three categories of measures from limits on support. The first category of exempted measures comply with Annex 2, titled 'Domestic Support: The Basis for Exemption from Reduction Commitments' and are commonly denoted as the 'green box'. The measures must meet a fundamental requirement of having "no, or at most minimal, trade-distorting effects or effects on production" and also meet the basic criteria of being publicly funded and not having the effect of providing price support.<sup>4</sup> Twelve paragraphs of Annex 2 set policy-specific criteria and conditions for measures under which government expenditures and payments are exemptible from support limits, including expenditures on providing general services to agriculture or the rural community, public stockholding for food security purposes and domestic food aid, and direct payments to producers under nine headings. The absence of limit on the expenditures or payments under measures satisfying these paragraphs encourages their adoption as support policies.

No other exempted measures are required to have at most minimal trade-distorting effects or effects on production. Measures can therefore be exempt from limit even if they distort trade more than minimally. One such category of exempt measures consists of developing countries' investment subsidies generally available to agriculture, input subsidies generally available to low-income or resource-poor producers, and support to encourage diversification from growing illicit narcotic crops.<sup>5</sup> Developed countries' support through trade-distorting measures of this type is subject to limit, thus Article 6.2 is one form of special and differential treatment, which is an integral component of the AoA.<sup>6</sup> The third category of exempt measures, often called the 'blue box', consists of payments under production-limiting programmes, subject to criteria relating to the fixity of area and yields, or livestock numbers or the share of base production on which payments are made.<sup>7</sup> The exemption is available to both developed and developing countries.

The remaining domestic support measures fall into a residual category, under which support is subject to a limit or limits operating in different ways.<sup>8</sup> This category is often loosely called the 'amber box', a term that is applied with various meanings.

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<sup>3</sup> AoA, *supra* note 1, art. 6.

<sup>4</sup> AoA, *supra* note 1, Annex 2.1.

<sup>5</sup> AoA, *supra* note 1, art. 6.2.

<sup>6</sup> AoA, *supra* note 1, art. 15.

<sup>7</sup> AoA, *supra* note 1, art. 6.5.

<sup>8</sup> AoA, *supra* note 1, arts. 1(a) & 6.1.

The non-exempt support is measured through an AMS for each product (product-specific AMS) and a separate sum of support that is not specific by product (non-product-specific AMS). As specified in Article 1 (Definition of Terms), Article 6, and Annex 3 (Domestic Support: Calculation of Aggregate Measurement of Support), each AMS includes those direct payments and other subsidies that are not exempted under the green box or, in practice, under Article 6.2 or the blue box.<sup>9</sup> A product's AMS includes any MPS calculated under Annex 3 of the Agreement, which differs from economic market price support.<sup>10</sup>

The Current Total Aggregate Measurement of Support (Current Total AMS or CTAMS) is the annual sum of all AMSs except any AMS that is no larger than its *de minimis* level and exclusive of any Article 6.2 or Article 6.5 support. The *de minimis* level is a nominal value of production multiplied by a *de minimis* percentage, which is 5%, 8.5%, or 10% depending on a member's group identification.<sup>11</sup> Specification of the two higher *de minimis* percentages is another form of special and differential treatment for developing countries.

The CTAMS of thirty-three members is subject to a positive ceiling specified in their WTO schedules of commitments under the heading Total AMS Commitments.<sup>12</sup> This article refers to the final commitment level after any reductions as the Bound Total AMS (BTAMS). The schedules of most members show a blank, i.e., no BTAMS, or nil or zero BTAMS. A member with no or nil BTAMS must keep each AMS within its annual *de minimis* level.<sup>13</sup> If the member has a positive BTAMS, one or more AMSs may exceed the *de minimis* level, which not only allows more AMS support, *ceteris paribus*, but also increases flexibility within the Agreement's rules. The BTAMS of original members derives from the amounts of certain support measured during 1986-88 (later years for accession members).<sup>14</sup> The flexibility, therefore,

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<sup>9</sup> AoA, *supra* note 1, arts. 1, 6 & Annex 3.

<sup>10</sup> AoA, *supra* note 1, Annex 3 at paras. 8 & 9.

<sup>11</sup> AoA, *supra* note 1, art. 6.4; the 8.5% was negotiated with China and Kazakhstan in their accessions.

<sup>12</sup> Goods Schedules of WTO members, <https://goods-schedules.wto.org/members> (The domestic support commitment is given in Part IV, Section I. The number of schedules with a positive ceiling has evolved from the original number as, for example, additional members have acceded to the WTO and some members have joined (and UK withdrawn from) the European Union).

<sup>13</sup> AoA, *supra* note 1, arts. 3.2, 6.3 & 7.2(b).

<sup>14</sup> 128 original members of the WTO are effectively the contracting parties of the GATT who participated in the 1994 conclusion of the Uruguay Round negotiations. In addition, 36 members had by August 2022 acceded to the WTO under Art. XII of the WTO Agreement. See generally Lars Brink, *Policy Space in Agriculture Under the WTO Rules on Domestic Support*, (Int'l Agric. Trade Rsch. Consortium, Research Paper No. 2015-01, Jul. 28, 2015) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2659406](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2659406).

largely benefits those developed members with the historically largest support. This negotiated bifurcation has been one of the problematic aspects of the AoA, especially by allowing some members to offer high levels of support for certain products.

#### A. *Measurement of Market Price Support*

The contrast between MPS under the AoA and an economic evaluation raises doubt about the extent to which the Agreement MPS is a meaningful measurement of price support. Economic price support is measured using the difference between the domestic price of a product and its corresponding border price from international markets observed for the same time period and level in the value chain. Multiplying this price gap by the total national production gives a policy support measurement that accounts for the combined effects of domestic price regulations and a variety of border measures that may subsidise or restrict imports or exports. This type of measurement enters the Producer Support Estimates (PSEs) of the Organisation for Economic Cooperation and Development (OECD) and other economic assessments of levels and trends in agricultural support.<sup>15</sup>

In contrast, the negotiated rules for MPS measurement in the AoA use a different price gap and often a different quantity. The measurement compares an applied administered price (AAP), which is a policy-determined domestic support price, to a fixed external reference price (FERP), which does not vary with world market conditions or exchange rates. The resulting price gap is multiplied by a “quantity of production eligible to receive the applied administered price,” commonly called eligible production, which also is a policy-defined variable.<sup>16</sup>

The two MPS measurements align only in limited circumstances, particularly because the FERP for original members was established from and is still based on 1986-88 world prices. The notified MPS has, therefore, despite its name, not been a good indicator of economic support. This economic interpretation problem extends to any product-specific AMS and the CTAMS when they include MPS. The difficulty in interpreting notified MPS economically has implications for assessing how tightly, from very restrictively to not at all, the AoA constrains producer price support that distorts trade.

To be specific, the following formulas show the different variables involved in the calculation of MPS under the AoA and in economic terms:

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<sup>15</sup> *Agricultural Policy Monitoring and Evaluation*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, <https://www.oecd.org/agriculture/topics/agricultural-policy-monitoring-and-evaluation/> [hereinafter *Agricultural Policy Monitoring and Evaluation*].

<sup>16</sup> AoA, *supra* note 1, Annex 3.8.

$$\begin{aligned} \text{AoA MPS}_t &= [\text{AAP}_t - \text{FERP}_{\text{fixed years}}] \times [\text{Eligible Production}_t] \\ \text{Economic MPS}_t &= [\text{Domestic Price}_t - \text{Border Price}_t] \times [\text{Total Production}_t] \end{aligned}$$

The variables defining the AoA MPS are those of paragraphs 8 and 9 of Annex 3, and “t” is the time indicator for the current year.<sup>17</sup> As noted above, the AAP is a policy variable, while the domestic price can be an observed price or a calculated average market price, which will often track but need not equal the AAP. The FERP is constant over time, while the border price varies from year to year with international market conditions and exchange rates. In practice, the border price is adjusted, for example by the OECD, with margins to correspond to the farm-level domestic price. The eligible production is the quantity of production eligible to receive the AAP, while the calculation of economic MPS uses total production.

The economic MPS often represents a major part of the policy-induced incentive to produce more than market signals would indicate. As the AoA seeks to rein in this incentive, it is important to assess how a member’s economic MPS is affected by complying with its domestic support obligations, which involve the AoA MPS. The differences among members in terms of their obligations and policies, as well as the parameters and data used in calculating the AoA MPS, favour member-specific assessments.

The calculation of MPS is a contentious subject in the implementation discussions of the Committee on Agriculture (Committee), ongoing negotiations and disputes. The size of the measured MPS under the AoA rules can make the resulting product-specific AMS exceed its *de minimis* allowance even though the economic MPS is small or nil.<sup>18</sup> This can arise for both developed and developing countries. The prevalence of contention varies among members. It depends, for any given economic MPS, on changes in the AAP, the member having no or a nil BTAMS or a positive BTAMS,

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<sup>17</sup> AoA, *supra* note 1, Annex 3 at paras. 8 & 9 (The economic MPS as reported in the OECD PSEs and similar uses is an *ex post* measurement of support once market outcomes in year t are observed. This article follows the convention of reporting *ex post* MPS measurements. An alternative measurement to the *ex post* observed outcome to estimate the effects of a price support programme is the *ex ante* effect on producers’ price expectations. By truncating the lower part of the distribution of possible prices to be received, the price support programme raises expected price and reduces price variance, which can stimulate production. The *ex ante* effect, which is difficult to measure, occurs even if the outcome results in no *ex post* price support being provided in any given year.).

<sup>18</sup> The *de minimis* allowance is for members without a positive BTAMS the limit on each AMS and for members with a positive BTAMS the level above which with this flexibility the AMS is included in the CTAMS.

its *de minimis* percentage, and the fact that most values of production are rising in nominal terms while BTAMS is fixed.

A product's AoA MPS can increase more rapidly than its *de minimis* allowance increases.<sup>19</sup> Assume that the administered price applies to all production, and for simplicity, the quantity of eligible production remains unchanged when the administered price is raised. When the administered price is raised by *a* dollars per tonne, the price gap in the MPS calculation also increases by *a* dollars per tonne. This larger gap is multiplied by the quantity of eligible production to generate a proportionately larger amount of MPS. However, although the producer price used to calculate the value of production may also rise by *a* dollars per tonne, only a percentage of that additional value is added to the *de minimis* allowance (5%, 8.5% or 10%, as applicable).

Therefore, over time, the increases in the administered price will generate a MPS large enough to exceed the product's *de minimis* AMS allowance, even if only keeping pace with inflation. This happens even though the allowance increases as the value of production increases. The problem is aggravated when the FERP is based on prices observed as long ago as 1986-88 as the AoA stipulates. The reference price from some 35 years ago often makes the MPS larger than when using a more recent reference price. Most members that have acceded to the WTO have used data from more recent years in their accession documents. In the dispute *China — Agricultural Producers*, the Panel concluded that the FERP for calculating MPS for wheat and rice should be based on the years 1996-98 used in China's accession.<sup>20</sup> Since the 1996-98 FERPs are higher than if based on 1986-88, the price gap between AAP and FERP is less, so this decision generated lower MPSs.

From an economic perspective, there is little disagreement that certain elements of the AoA MPS calculation ought to be changed. Some Uruguay Round negotiators may have envisioned limiting the support delivered through an administered price without making it impossible to use an administered price as a policy instrument, while others may have had eventual elimination of MPS programmes in mind. Negotiators clearly had in mind a path towards revising the AoA, starting in 2000, as set out in Article 20.<sup>21</sup> The Agreement also mandates that in the Committee's review process members shall give due consideration to the influence of excessive

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<sup>19</sup> Alan Matthews, *Food security, developing countries and the multilateral trade rules* (Background Paper for the State of Agricultural Commodity Markets 2015-16, Food and Agriculture Organization, 2015).

<sup>20</sup> Panel Report, *China — Domestic Support for Agricultural Producers*, WTO Doc. WT/DS511/R (adopted Apr. 26, 2019) [hereinafter *China — Agricultural Producers*].

<sup>21</sup> AoA, *supra* note 1, art. 20.



rates of inflation on any member's ability to abide by its commitments.<sup>22</sup> This recognises that the fixity of the reference price in the MPS formula may cause difficulties. The base years for the FERP could be updated or revised but such proposals did not animate the negotiations continued in the Doha Round, or since, until some attention has focused on this issue recently. An update would in many cases have led to a higher FERP and a smaller price gap, making it more feasible to support producers by means of an administered price.<sup>23</sup> The eventual impossibility of using an administered price may be a consequence of the ongoing negotiations not having led to a more recent base period for the external reference price. At the same time, it is an achievement in terms of prompting greater market orientation.

### B. Market Price Support in India

Not only does the AoA MPS differ from economic MPS, but members apply the AoA formula under differing interpretations of the relevant prices and quantities to use. India's MPS, for example, has been subject to different calculations and scrutiny.

India's notifications to the Committee calculate a year's MPS for crops of which in its view government agencies have purchased a quantity at administered prices during the year.<sup>24</sup> In most years, India has calculated negative MPS for wheat and positive MPS for rice, cotton and pulses within its *de minimis* 10% AMS limits applying to each product in absence of a positive BTAMS. As an original WTO member, India based its external reference prices on 1986-88 border prices expressed in INR/tonne and evaluated value of production and all support components in INR (Indian rupees). In switching subsequently to calculating support in USD (US dollars), India's annual notifications of MPS convert the

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<sup>22</sup> AoA, *supra* note 1, art. 18.4.

<sup>23</sup> This is the case for China for wheat and rice in 2012-15 considered in dispute and would be the case for some original members including the EU, India, United States and Japan for certain products in their most recently notified year as of 2021. However, this is not always the outcome. Among the nine accession members other than China that calculated MPS in their base period, using a more up-to-date FERP resulted in a smaller MPS in subsequent years for only few products. See Dukgeun Ahn & David Orden, *China — Domestic Support for Agricultural Producers: One Policy, Multiple Parameters Imply Modest Discipline*, 20(4) WORLD TRADE REV. 389, 389-404 (May 04, 2021); Lars Brink, *An Ensemble of Potential Changes in the WTO Rules on Domestic Support in Agriculture: Comparing Support Space and Measured Support*, presentation at the International Agricultural Trade Research Consortium (IATRC) 2021 Annual Meeting (Dec. 12-14, 2021); Lars Brink, *Measuring Price Support under WTO Domestic Support Rules: How Much Advantage from Being an Article XII Member?*, presentation at the International Agricultural Trade Research Consortium (IATRC) Annual Meeting (Dec. 14-15, 2020).

<sup>24</sup> India's domestic support notifications for various years are in the WTO series G/AG/N/IND/. See, e.g., G/AG/N/IND/27, circulated 1 April 2022, for marketing year 2020/2021, denoted in this article as 2020.

external reference prices into USD/tonne at a 1986-88 exchange rate but convert the AAPs at subsequent yearly exchange rates. With a rising INR/USD exchange rate, this substantially narrows the price gap in the MPS calculation. It also lowers its percentage of production value (%MPS) with value of production also measured in USD at yearly exchange rates. India's use of only quantities purchased by government at administered prices as eligible production, as compared to using total production, also reduces the measured MPS.

India's conversions of AAPs and values of production from INR to USD at yearly exchange rates incorporate three adjustments as compared to 1986-88. First, the conversions adjust for the inflation occurring in India after 1986-88 to the extent it is offset by a corresponding depreciation of the INR. Second, inflation also occurs in the United States of America (US) and if the INR/USD exchange rate adjusts in purchasing power parity terms, its increase reflects the excess of rates of inflation in India compared to the US, not the full extent of inflation in India. Third, an exchange rate change can deviate from a pure monetary adjustment, whether real (inflation-adjusted) appreciation or depreciation. This real exchange rate movement compared to the real 1986-88 exchange rate is also incorporated in the AAPs and values of production when they are converted from INR to USD at yearly exchange rates. None of these adjustment components applies to the external reference price.

A member may bring to the attention of the Committee "any measure which it considers ought to have been notified by another Member".<sup>25</sup> While these submissions are often called counter-notifications, they are not necessarily submitted in opposition to a member's own notification and can be submitted in the absence of a member's own notification.

No counter-notifications were submitted in domestic support for many years until in 2018 and 2019 the United States, Australia and Canada made such submissions regarding the amounts of AMS support India provided to producers of wheat, rice, sugarcane, cotton and pulses.<sup>26</sup> The counter-notifications concerned in particular the

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<sup>25</sup> AoA, *supra* note 1, art. 18.7.

<sup>26</sup> Counter-notifications, Communication from the United States of America pursuant to Article 18.7 of the Agreement on Agriculture, *Certain Measures of India Providing Market Price Support to Rice and Wheat*, WTO Doc. G/AG/W/174 (May 9, 2018); Communication from the United States of America pursuant to Article 18.7 of the Agreement on Agriculture, *Certain Measures of India Providing Market Price Support to Cotton*, WTO Doc. G/AG/W/188 (Nov. 9, 2018); Communication from Australia pursuant to Article 18.7 of the Agreement On Agriculture, *India's Measures to Provide Market Price Support to Sugarcane*, WTO Doc. G/AG/W/189 (Nov. 16, 2018); and Communication from Canada and the United States of America pursuant to Article 18.7 of the Agreement on Agriculture, *Certain Measures of India providing Market Price Support to Pulses, including Chickpeas, Pigeon Peas, Black Matpe, Mung Beans and Lentils*, WTO Doc. G/AG/W/193 (Feb. 12, 2019) [hereinafter Counter-notifications].

calculation of MPS, but allowed also for the inclusion of other components in the products' AMSs.

In contrast to India's calculations, in calculating MPS the counter-notifications use AAP and FERP in INR/tonne, as in India's 1986-88 calculations. This yields larger price gaps. The counter-notifications also use total production as the eligible production, instead of purchases by the government. Together these two differences yield much larger MPSs (and %MPSs) than calculated by India. MPS for these products calculated in the counter-notifications exceeded the respective 10% limits on AMSs by wide margins, as shown in Table 1. For example, if we take the case of wheat, India's notified MPS averaged -1.5% of the value of production during 2010-13 for which the counter-notified MPS averaged 63.7%. Likewise, for rice, the averages were 6.9% compared to 78.8%. Similar differences occurred in later years.<sup>27</sup>

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<sup>27</sup> See Lars Brink & David Orden, *Taking Stock and Looking Forward on Domestic Support under the WTO Agreement on Agriculture*, (Int'l Agric. Trade Rsch. Consortium, Commissioned Paper No. 23, Apr. 30, 2020), <https://ageconsearch.umn.edu/record/303559> [hereinafter Taking Stock] (To evaluate the adjustment effects on MPS as percent of value of production during 2010-17, two alternative measurements were also compared to the notified and counter-notified MPSs for wheat and rice. Both alternatives used total production as eligible production. The first alternative used the USD price gap and value of production as calculated by India. The second alternative adjusted the price gap to offset only the effect of inflation in India since 1986-88 by expressing AAP and value of production in INR deflated by India's wholesale price index for all commodities. In the first alternative measurement, wheat MPS, when positive, remained below 10% of value of production but rice MPS exceeded 10% in all years. The deflation adjustment gave negative MPS for wheat for all years and for rice until 2014. The results highlight the contrast between MPS in the counter-notifications and calculated with these two inflation-related adjustments. This empirical observation potentially relates to but is separate from the legal issue of how, in the Committee on Agriculture review process under AoA Art. 18.4, members are to give due consideration to the influence of excessive rates of inflation on a member's ability to abide by its domestic support commitments. These alternative measurements are also informative in the context of considering the influence of excessive rates of inflation as suggested in negotiations over acquisition at administered prices of public stocks for food security purposes.).

**Table 1: Counter-Notifications in 2018-19 Regarding Market Price Support in India.**<sup>28</sup>

Product	Support years	Range of MPS	Date of circulation	Submitted by
Wheat	2010-11 to 2013-14	60% to 69%	9 May 2018	United States
Rice	2010-11 to 2013-14	74% to 84%	9 May 2018	United States
Cotton	2010-11 to 2016-17	54% to 81%	9 November 2018	United States
Sugarcane	2011-12 to 2016-17	77% to 100%	16 November 2018	Australia
Pulses	2016-17	47%	12 February 2019	Australia, Canada, United States
Chickpea		64%		
Pigeon pea		32%		
Mung bean		85%		
Black matep		52%		
Lentils		41%		

An Article 18.7 counter-notification documents a concern more formally and comprehensively than a written question for a meeting of the Committee on Agriculture. It alerts a member more strongly that another member disagrees with its reporting, or lack of reporting, in notifications and can lead to extended discussion in the Committee. The large differences between India's notified AMSs and the levels calculated in the counter-notifications for wheat and rice underlie the tension related to counting against their limits the producer support a developing country may provide by acquiring stocks at administered prices for food security purposes. If India were to calculate MPS for these products with the price gap in the counter-notifications, bringing MPS within its limits would require setting much lower AAPs than it has or constraining government purchases at levels far below past purchases. These considerations may have motivated India's negotiating stance that exceeding its support limits in certain circumstances not be subject to dispute settlement.

Adjudication to date over MPS leaves ambiguity about the proper measurement of India's MPSs. In *India — Sugar and Sugarcane*, India asserted there is no MPS for sugarcane because private mills purchase sugarcane instead of the government, although subject to minimum prices set by government.<sup>29</sup> The Panel rejected India's

<sup>28</sup> Counter-notifications, *supra* note 26. MPS expressed as percent of product's value of production. Marketing years are given in the counter-notifications as, e.g., 2010-11 for year denoted 2010 in this article.

<sup>29</sup> Panel Report, *India — Measures Concerning Sugar and Sugarcane*, WTO Doc. WT/DS579R, WT/DS580R and WT/DS581R (circulated Dec. 14, 2021) [hereinafter *India — Sugar and Sugarcane*].

argument and found excessive MPS for sugarcane ranging between 86.1% and 93.6% in the 2014 to 2018 period, using prices and value of production in INR and total production as eligible production, as proposed by the complainants and similar to the counter-notifications. Levels of support found by the panel using this measurement far exceeded economic price support as measured by OECD, which averaged 14.4% for sugar during the years in dispute.<sup>30</sup> India has appealed certain issues of law and legal interpretation in the Panel Report, including its MPS measurement.<sup>31</sup>

A further complication comes from the Appellate Body findings in *Korea — Various Measures on Beef* that governments could set caps below total production on the quantities that would be purchased and thus on eligible production in calculating MPS.<sup>32</sup> The Panel in *China — Agricultural Producers* also allowed for this possibility.<sup>33</sup> China subsequently set caps on purchases in the legislation for its support programmes to claim it had come into compliance with its AMS limits with only a modest lowering of its AAPs. Such an approach could allow India to set eligible production less than total production, as it does in its present MPS calculation even in the absence of such caps. With the price gap measured as in the counter-notifications, using FERP from 1986-88, the constraints on support prices and quantities of eligible production would nonetheless be more severe for India than for China with its FERP based on 1996-98 world prices.<sup>34</sup>

### III. NEGOTIATIONS ON SUPPORT UNDER PUBLIC STOCKHOLDING FOR FOOD SECURITY PURPOSES

The calculation and treatment of MPS with regard to the rules under Public Stockholding for Food Security Purposes is a major unresolved issue in negotiations continued from soon after the implementation of the AoA began. The consequences of MPS making AMS support exceed its limit have later entered into consideration.

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<sup>30</sup> LARS BRINK & DAVID ORDEN, *AGRICULTURAL DOMESTIC SUPPORT UNDER THE WTO: EXPERIENCE AND PROSPECTS* (Cambridge University Press) (forthcoming March 2023) [hereinafter *Agricultural Domestic Support*].

<sup>31</sup> Notification of an Appeal by India under Article 16.4 and Article 17.1 of The Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and Under Rule 20(1) of the Working Procedures for Appellate Review, *India — Measures Concerning Sugar and Sugarcane*, WTO Doc. WT/DS579/10, WT/DS580/10 and WT/DS581/11 (circulated Jan. 11, 2022).

<sup>32</sup> Appellate Body Report, *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WTO Doc. WT/DS161/AB/R (adopted Jan. 10, 2001).

<sup>33</sup> *China — Agricultural Producers*, *supra* note 20.

<sup>34</sup> *Agricultural Domestic Support*, *supra* note 30.

The Agreement's rules allow the exemption from AMS of a government's expenditures in relation to the accumulation and holding of stocks as an integral part of a food security programme. One of the conditions for the exemption is that government food purchases shall be made at current market prices. The issue for analysis has been footnote 5 of Annex 2, which allows developing countries to exempt the expenditures even if they acquire and release the stocks at administered prices.<sup>35</sup> The exemption is conditional on the member accounting for the difference between the acquisition price and the external reference price in the AMS. Although footnote 5 does not mention MPS, accounting for the price difference is conventionally interpreted as calculating MPS and including it in AMS as detailed in Annex 3.

*A. Tracking the Developments till 2022*

As discussed above, the difference between the acquisition price, as the administered price, and the FERP from 1986-88 (or later for accession members) can indicate a large price gap. Using it to calculate MPS and including the MPS in the product's AMS can make the AMS exceed its *de minimis* level, even when the AAP is close to the current border price adjusted to the same level in the value chain. The conditionality formulated in the Agreement's footnote 5 in effect inhibits excessive producer support measured as an AMS by means of buying at an administered price, but it does not impede the acquisition of stocks for food security purposes at market prices.<sup>36</sup>

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<sup>35</sup> AoA, *supra* note 1, Annex 2.3.

<sup>36</sup> See *The Economic Effects of Public Stockholding Policies for Rice in Asia*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (Oct. 18, 2018), <https://www.oecd.org/economy/the-economic-effects-of-public-stockholding-policies-for-rice-in-asia-9789264305366-en.htm> (Acquisition at administered prices may not be the only or the best avenue to increase food security if, for example, a country's inadequate food security is the result of segments of its population not having the disposable income to obtain sufficient nutritional intake. High administered producer prices can raise consumer prices, but the acquired stocks can be used to provide food at lower prices to targeted segments of the population. It is not clear how acquiring the necessary quantities at market prices instead of administered prices might affect the ability of stockholding programmes to meet their consumer-oriented objectives, such as releasing certain quantities of food to the targeted population. A member's shift from acquiring the needed stocks at an administered price to acquiring them at the market price would eliminate the need to calculate MPS under the AoA, and acquisition for public stockholding would not be constrained by AMS limits. Focusing on the market effects of stockholding policies, OECD laid out a framework for evaluating the differences between buying at market prices and buying at administered prices, but governments of some members continue to press for the option of acquiring stocks at administered prices as part of their food security and farm support policies.).

Some developing country members have suggested several options for changing the rules relating to this conditionality, some of which would effectively eliminate or override its inhibiting role under certain conditions. Other members worry about the trade consequences of such changes.

The 2008 draft modalities from the Doha Round negotiations included a proposal that in certain circumstances, involving support for low-income or resource-poor producers or for fighting hunger and rural poverty, the acquisition expenditure would be exemptible without accounting for the price difference in the AMS even when acquisition was at an administered price.<sup>37</sup> The negotiations that had taken place since 2000 were intense. However, members failed to agree on a comprehensive Doha Round outcome, in part due to differences over agricultural domestic support and the rules for acquisition of stocks at administered prices for food security programmes. There were also no decisions on food stock acquisitions made at the WTO Ministerial Conference in 2011.

With some members continuing to press for a resolution, the 2013 Ministerial Conference, held in Bali, decided on an interim mechanism.<sup>38</sup> A developing country that exempts expenditure under the then-existing programmes on acquisition of traditional staple food crops at administered prices and accounts for the price difference in the AMS would not face a challenge under the WTO dispute settlement rules even if this makes an AMS or CTAMS exceed its limit. The WTO General Council in 2014<sup>39</sup> (under the pressure of India potentially blocking the adoption of the Trade Facilitation Agreement) and the 2015 Ministerial Conference<sup>40</sup> reaffirmed this decision and renewed a mandate to reach a permanent solution. The interim opening to offer excessive price support to producers without dispute challenge is subject to notification and other conditions and requirements designed to reduce, and facilitate assessing, the likelihood that the accumulation and release of stocks distort trade or adversely affect the food security of other members.

By mid-2022, India was the only member to have claimed shelter under the interim mechanism. With India's rice support programme purchases above 38% of total production, even using its particular calculations made India's rice AMS reported in its notifications exceed the 10% limit in 2018 (11.5%), 2019 (13.7%) and 2020 (15.2%). India claimed shelter against dispute challenge and remains a leading

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<sup>37</sup> World Trade Organization, Committee on Agriculture in Special Session, *Revised Draft Modalities for Agriculture*, TN/AG/W/4/Rev.4 (Dec. 6, 2008).

<sup>38</sup> World Trade Organization, Ministerial Decision of 7 December 2013, WT/MIN(13)/38, WT/L/913 (Dec. 11, 2013).

<sup>39</sup> World Trade Organization, Decision of 27 November 2014, WT/L/939 (Nov. 28, 2014) [hereinafter Nov. 27 Decision].

<sup>40</sup> World Trade Organization, Ministerial Decision of 19 December 2015, WT/MIN(15)/44, WT/L/979 (Dec. 21, 2015).

proponent of a permanent solution similar to the interim mechanism shielding against a dispute challenge of domestic support compliance. India is one of the world's top producers and exporters of foodstuffs such as rice, sugar, and bovine meat. Producers and exporters in some other countries are therefore wary of the role that government purchases at administered prices may play in stimulating production or in building exportable stocks. The 2017 Ministerial Conference, held in Buenos Aires, considered numerous proposals on public stockholding and other dimensions of domestic support. However, in a fraught global trade context, the ministers neither took any decision on agriculture nor even agreed on an overall ministerial declaration.

### B. *Impasse Continues at the 2022 Ministerial Conference*

Following the 2017 conference, members prepared for the 2022 Ministerial Conference by discussing inputs on seven separately labelled negotiating topics in agriculture, with transparency added in late 2021. Negotiations, involving domestic support, continued not only on the topic with that heading but also on the topics of public stockholding, cotton, and transparency. Member engagement in the agriculture negotiations was particularly active on these topics.<sup>41</sup>

Although negotiating progress had been scant, the discussion of a permanent solution on acquisition at administered prices of stocks for food security purposes remained a high-profile issue in preparation for the June 2022 (Geneva) Ministerial Conference, originally scheduled for 2020 but twice delayed because of the COVID-19 pandemic.<sup>42</sup>

The interim mechanism remains in place until a permanent solution is agreed and adopted.<sup>43</sup> Committed to making efforts to achieve that end, members submitted analyses and proposals over several years. One group of members investigated which members had notified exemption of expenditures on stock accumulation as well as

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<sup>41</sup> The other negotiating topics were market access, export competition, export prohibitions or restrictions, and an import special safeguard mechanism for developing countries. The history and complexities of negotiations across agriculture are assessed in a recent issue of this journal. See Alan Swinbank, *The WTO Agreement on Agriculture: Where Next?*, 14(1) TRADE, L. & DEV. (2022). Christian Häberli delves broadly into limitations of the WTO rules for agriculture and the relationship of these rules and their shortcomings to performance of world food markets, the right to food under public international law and climate change mitigation. See Christian Häberli, *Food Crises (Cont'd): What's Wrong with Trade and Investment Rules*, 13(2) TRADE, L. & DEV. (2021).

<sup>42</sup> World Trade Organization, *WTO members agree on mid-June dates for reconvening MC12* (Feb. 23, 2022), [https://www.wto.org/english/news\\_e/news22\\_e/mc12\\_23feb22\\_e.htm](https://www.wto.org/english/news_e/news22_e/mc12_23feb22_e.htm).

<sup>43</sup> Nov. 27 Decision, *supra* note 39.



acquisition of stocks at administered prices for which products and in which years.<sup>44</sup> The investigation showed that four members (China, India, Indonesia, and the Philippines) reported this practice in their latest notified year after 2013, which was 2016, 2019, 2018, and 2019, respectively, as of mid-2021. The number of identified members is few, given the negotiating attention attached to the public stockholding issue, but each is a significant producer of some of the identified products. China, India, and Indonesia were also among the G-33 group of members<sup>45</sup> that elaborated during 2021 on earlier proposals on this issue along with the African Group.<sup>46</sup>

Some members saw a need to urgently address the issues of acquisition for public stockholding to alleviate concerns about their food security situation and rural development needs, both heightened by the COVID-19 pandemic and global food price turbulence related to Russia's invasion of Ukraine in February 2022. Others failed to see how relaxing price support disciplines would help in this regard. The differences among members also concerned the type of permanent solution, its coverage in terms of products, programmes and members, transparency, and safeguards to prevent excess purchased stocks from being offloaded on global markets. It was argued that making room for unlimited MPS in some situations would allow more trade distortion instead of reducing it, which is also a potential effect of the interim mechanism shielding compliance from dispute challenges. Introducing a permanent shelter against challenge would alter the balance between all rights and obligations in the WTO framework, including the settlement of disputes, in a more profound way than altering those specified for domestic support in the AoA.<sup>47</sup>

As members submitted input on the issue of acquisition at administered prices for public stockholding, they also met in sessions dedicated to this topic. However, members had by late 2021 shown little movement. Brazil considered that the issue was not mature for a negotiating outcome.<sup>48</sup> The chair of the agriculture negotiations interpreted the proponents as seeking a solution that was simple, efficient, and

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<sup>44</sup> World Trade Organization, Committee on Agriculture in Special Session, *Observations on Public Stockholding for Food Security Purposes*, JOB/AG/210/Rev.2 (May 11, 2022).

<sup>45</sup> World Trade Organization, Committee on Agriculture in Special Session, *Public Stockholding for Food Security Purposes*, JOB/AG/214/Rev.1 (Sept. 16, 2021).

<sup>46</sup> World Trade Organization, Committee on Agriculture in Special Session, *Public Food Stockholding for Developing Country Members: Communication from the African Group*, JOB/AG/204 (July 12, 2021) [hereinafter *Communication from the African Group*].

<sup>47</sup> The same outcome as when compliance is not challenged would eventuate, without a functioning Appellate Body, if a member found by a panel to have an excessive AMS appeals the finding and thus avoids policy change. As noted above, India has appealed a panel ruling that it provided excessive AMS support for sugarcane.

<sup>48</sup> World Trade Organization, Committee on Agriculture in Special Session, *Brazil's comments on the report by the Chair of the General Council (JOB/GC/259)*, JOB/AG/209 (July 15, 2021).

broader in product and programme coverage than the interim mechanism. The chair interpreted the non-proponents as being concerned about potential trade distortions and unlimited MPS beyond the Uruguay Round commitment levels.

The draft text circulated by the Chair of the agricultural negotiations in late 2021 mainly suggested that ministers at the 2022 Conference decide on work programmes that might allow taking substantive decisions at the following Conference.<sup>49</sup> On acquisition of public stocks for food security purposes, ministers would undertake to make all concerted efforts to agree and adopt a permanent solution. On the topic of domestic support, the draft text suggested a decision to negotiate towards agreeing at the subsequent conference on modalities to substantially reduce trade-distorting domestic support in a time frame to be determined, with decisions on cotton to fit within this framework. The draft text was much less specific than the proposals by members on many issues. It differed remarkably in ambition, substance, and specificity from the Doha Round draft modalities of 2008, which had been negotiated in substantial detail but were never finalised or adopted. Preparing for the 2022 Ministerial Conference, some key members were far from forceful in seeking agreement to strengthen the disciplines on domestic support. The Chair's draft text could only hope to create some negotiating momentum, with a view to achieving outcomes in later years. Ultimately, ministers were not able to agree on agriculture even on a final draft decision concerning work plans to advance negotiations on public stockholding, other aspects of the domestic support rules and commitments or the additional negotiating topics.<sup>50</sup> Ministers adopted a decision committing members not to impose export prohibitions or restrictions on purchases for humanitarian purposes by the World Food Programme<sup>51</sup> and a declaration addressing emergency responses to food insecurity in a broad manner without specific new obligations.<sup>52</sup>

#### IV. AN OPTION FOR IMPROVING THE MEASUREMENT OF MARKET PRICE SUPPORT

The difference between the measurement of MPS under the AoA and an economic measurement is problematic in terms of achieving the Agreement's objective of

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<sup>49</sup> World Trade Organization, Committee on Agriculture in Special Session, *Report by the Chairperson, H.E. Ms Gloria Abraham Peralta, to the Trade Negotiations Committee*, TN/AG/50 (Nov. 23, 2021).

<sup>50</sup> World Trade Organization, Draft Ministerial Decision on Agriculture, WT/MIN(22)/W/19 (June 10, 2022) [hereinafter Draft Decision on Agriculture].

<sup>51</sup> World Trade Organization, *Ministerial Decision on World Food Programme Food Purchases Exemption from Export Prohibitions or Restrictions*, WT/MIN(22)/29, WT/L/1140 (June 22, 2022).

<sup>52</sup> World Trade Organization, *Ministerial Declaration on the Emergency Response to Food Insecurity*, WT/MIN(22)/28, WT/L/1139 (June 22, 2022).

substantial progressive reductions in agricultural support and protection. The OECD calculates that India's economic price support for wheat, rice, and cotton was mostly negative during the twenty-two-year period spanning across 2000-21.<sup>53</sup> India kept producer prices well below the border prices (adjusted to farm level) during the years when world grain prices rose sharply in the late 2000s and early 2010s. India later narrowed the gap as world prices declined by raising support prices. Economic MPSs became less negative and were positive for wheat in 2016 and 2019. For reasons discussed above (AAP and value of production converted at yearly exchange rates and only purchased quantities as eligible production) India's notified MPSs are also relatively low.

The diversity of measurements of MPS under different interpretations of the AoA in notifications, counter-notifications, and dispute arguments adds complexity to the problem. While recognising that the Agreement's measurement of MPS relies on using the policy-determined variables of AAP and eligible production, a major part of the difference between it and an economic measurement is the use of a reference price that has remained constant for a long time. This motivates examining ways to reduce the difference between the AoA MPS and an economic MPS.

Revising the MPS calculation under the AoA to base the reference price on price observations from lagged recent years would in many cases make it and the economic MPS more similar, without making them identical. A further step in making the rules-based MPS more like an economic MPS would be to apply the calculated price gap to all production, whether purchased under the price support programme or not. This is because all production benefits when the AAP exceeds the border price in a situation where a significant percentage of national output can be sold at the AAP. In such a situation, arbitrage across geographically-dispersed domestic markets at the farm-level tends to cause the support price to determine the minimum producer price nationally.

A lagged reference price (LRP) option for measuring MPS would replace the FERP with a moving average of lagged world market border prices adjusted for transportation costs and stage of processing for comparability with the basic agricultural product to which the AAP applies. The LRP MPS using, e.g., a 3-year moving average of lagged prices, would be:

$$\text{LRP MPS}_t = [\text{AAP}_t - \text{LRP}_t] \times [\text{Total Production}_t]$$

where  $\text{LRP}_t$  is the moving average of lagged border prices (average (t-1, t-2, t-3) or an Olympic moving average from five lagged years dropping the lowest and highest values). The LRP MPS enables the government to use an administered price to

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<sup>53</sup> Agricultural Policy Monitoring and Evaluation, *supra* note 15.

benchmark producer prices in the domestic market within the space that is available within the applicable border protection. Some members see this as an essential policy option. Since the LRP MPS uses AAP in the price gap, there is room for the domestic price to exceed the AAP without raising the LRP MPS. This would accommodate the effects on domestic prices of tariffs or other border or behind-the-border policy measures, without subjecting these effects to the domestic support discipline. Domestic prices can differ from border prices not only because of an administered price but for reasons that are not disciplined by AMS limits.<sup>54</sup>

Comparing three MPS measurements (AoA MPS, Economic MPS and LRP MPS based on three lagged years) in percentage terms for wheat and rice in India over the period 2008-20 illustrates their differences (Figure 1). In this comparison, AAP and value of production are measured in INR and eligible production is total production, similarly to the counter-notifications. With eligible production and value of production from year t, the percentage measurements differ only by the different price gaps in their numerators.<sup>55</sup>

The key observation from Figure 1 is the large difference between the AoA %MPS and the economic and LRP %MPSs. The AoA %MPS for wheat and rice is in the range of 60% to 80% in all years, similar to the levels in the counter-notifications. Conversely, the economic %MPS and LRP %MPS are almost all negative as domestic prices are generally below year t border prices and AAPs below lagged border prices.<sup>56</sup> Unlike with the AoA MPS, with the LRP MPS India would not need to lower wheat or rice support prices or cap eligible production to meet its AMS limits, which is more consistent with its negative economic MPS. It would face the economically meaningful constraint that support prices not exceed a moving average of recent border prices by more than 10%.

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<sup>54</sup> *China — Agricultural Producers*, *supra* note 20. The panel noted this point when considering corn prices after China's corn price support programme was terminated in 2016.

<sup>55</sup> The quantity of production and value of production in year t are not known when the AAP for year t is determined. However, not having final information on these variables when government sets the AAP for year t has not been a concern in members' *ex post* calculations of MPS under the AoA and an *ex-post* evaluation is applied here as well.

<sup>56</sup> *See* *Agricultural Policy Monitoring and Evaluation*, *supra* note 15. It sets MPS to zero in years (2008-10 and 2017-18) when India imported wheat while domestic producer prices were below the border reference prices. Figure 1 retains any negative values in economic and LRP MPSs.

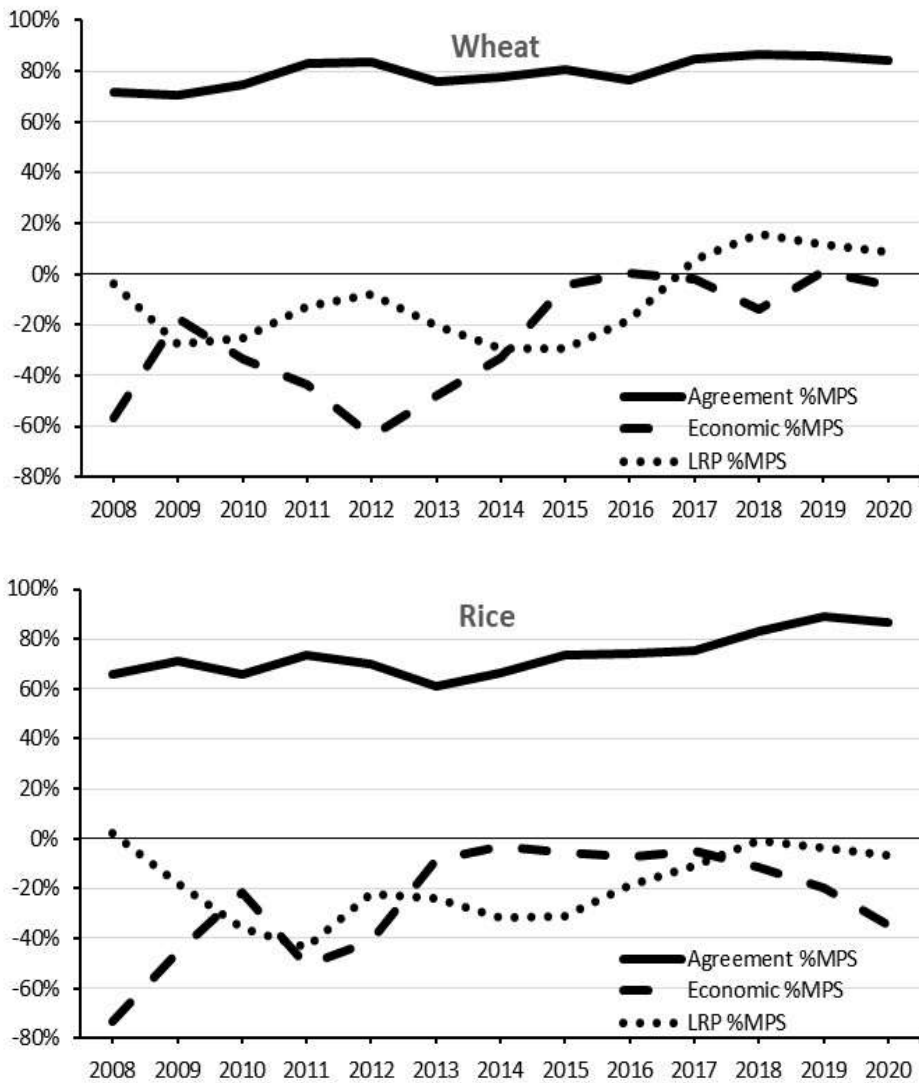


Figure 1. Measurements of Market Price Support of Wheat and Rice for India, 2008-20 (percent).<sup>57</sup>

A second observation from Figure 1 is that economic %MPS and LRP %MPS move along a common track for wheat and rice although not perfectly aligned. In both

<sup>57</sup> Authors' calculations using data on India's support prices and from OECD Agricultural Policy Monitoring and Evaluation, *supra* note 15.

cases, economic %MPS is more negative than LRP %MPS in 2008 when world prices rose sharply compared to India's producer and administered prices and compared to lagged border prices. Another large difference occurs in 2012, especially for wheat, primarily because the 2012 border price increased to exceed lagged border prices. The subsequent trend of economic %MPS becoming less negative comes from domestic prices increasing while border prices fall. The negative LRP %MPS declines to become more negative through 2015 as lagged border prices rise by more than AAPs, a pattern that reverses in following years.

The above comparisons reinforce the idea that improving the measurement of MPS under the AoA could bring the effect of its discipline on AMS closer to what it would be if the MPS was the economic MPS. Using a moving average of lagged border prices as the reference price is not ideal compared to using the current border price. However, it brings the reference price in many situations closer to the current border price than using a FERP based on increasingly distant past years.

The use of a moving average reference price in MPS calculations was discussed in the Uruguay Round negotiations as was the idea of a FERP being fixed only for five years. Introducing a moving average reference price or adjusting the base years for FERP has since received only scant attention in negotiations until recently, as noted above. The G-33 group in 2013 raised the option of revisiting the FERP but discussion waned as attention focused on the interim mechanism.<sup>58</sup>

Attention further addressed the reference price issue in negotiations leading to the 2022 Ministerial Conference. Members observed that the African Group highlighted the problems with the outdated FERP and proposed an Olympic moving average of the preceding five years' prices as the external reference price when higher than the FERP from 1986-88.<sup>59</sup> Members observed that the African Group proposal would also make permanent the insulation from dispute challenge of compliance when MPS resulting from stock acquisition at administered prices generates an excessive AMS even with the modified reference price. Members observed that the African Group, the African, Caribbean and Pacific (ACP) members and the G-33 then jointly proposed that a year's external reference price be the Olympic moving average price of the preceding five years, or the AoA's external reference price adjusted for excessive inflation.<sup>60</sup> Instead of there being an explicit shelter against dispute settlement regarding compliance of support with limits, any producer

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<sup>58</sup> World Trade Organization, Committee on Agriculture in Special Session, *G-33 Non-paper*, JOB/AG/25 (Oct. 3, 2013).

<sup>59</sup> Communication from the African Group, *supra* note 46.

<sup>60</sup> World Trade Organization, Committee on Agriculture in Special Session, *Public Stockholding for Food Security Purposes: Proposal by the African Group, the ACP, and G33*, JOB/AG/229 (May 31, 2022).

support under public stockholding programmes would, provided that certain conditions were met, be deemed to be in compliance with the Agreement's limits on AMS support. Thus, in both of these proposals by groups of members, adjusting the reference price is a secondary consideration to continuing the insulation of MPS from acquisition of stocks for food security purposes at administered prices from dispute challenge or limit.

In June 2022, the Committee in Special Session (the agriculture negotiating forum) formulated draft decisions for the 2022 Ministerial Conference. On PSH, the draft decision suggested only that members continue “negotiations and work towards agreeing and adopting a permanent solution” by the following conference.<sup>61</sup> The draft also suggested that the negotiations “shall consider, *inter alia*, an assessment of the external reference price” along with other issues.<sup>62</sup> This is the first mention of assessing the reference price in a document at this level, which also notes that the reference price issue “would be considered more broadly in the context of current AoA disciplines.”<sup>63</sup> Outside of the negotiations, the New Pathways group of independent observers recommended a lagged moving average reference price.<sup>64</sup> Glauber and Sinha, writing for the International Institute for Sustainable Development, also discuss the option of an updated or moving average reference price, while like the African Group their main recommendation is an extension of the interim solution.<sup>65</sup> In contrast, this article argues that revising the MPS formula is, in and of itself, a way to break the impasse about a permanent solution to the public stockholding issue.

The experience gained over time of implementing price support policies and applying the rules of the AoA demonstrates the need for all of the recent attention given to revising the AoA MPS. Further analysis of using a moving average of lagged border prices instead of a FERP to calculate MPS is merited. Retaining the economically misleading FERP-based indicator of price support, when negotiating new legal rules on domestic support, is not a fruitful route to correcting and preventing distortions in world agriculture markets.

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<sup>61</sup> Draft Decision on Agriculture, *supra* note 50.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> Carmel Cahill et al., *New Pathways for Progress in Multilateral Trade Negotiations in Agriculture* (May 2021), <https://www.ifpri.org/publication/new-pathways-progress-multilateral-trade-negotiations-agriculture>. The New Pathways group paralleled the proposal for a lagged moving average reference price in Taking Stock, *supra* note 27.

<sup>65</sup> Joe Glauber & Tanvi Sinha, *Procuring Food Stocks Under World Trade Organization Farm Subsidy Rules*. (Int'l Inst. for Sus. Dev. Research Paper) (Aug. 2021), <https://www.iisd.org/system/files/2021-08/food-stocks-wto-farm-subsidy-rules.pdf>.

## V. IMPROVED MPS MEASUREMENT TO BREAK THE IMPASSE

What remains, in conclusion, is to weave together the threads of the analysis presented above. Measuring MPS under the AoA has proven to be among its most problematic aspects. The AoA MPS has two underlying flaws. First, the use of a very out-of-date reference price to determine the price gap that enters the calculation makes the gap in many cases generate a large amount of MPS, even if there is only little or no support in economic terms. Second, allowing eligible production to be defined by legislated caps on purchases distances the AoA MPS from an economic measurement, in this case enabling the calculation of less support than if using total production.

The MPS measured under the AoA, therefore, often misrepresents the actual amount of support that might distort trade. Economic effects in the form of production and trade distortions do not derive from the MPS so measured but from the MPS measured through economic methods. Designing new AMS limits, based on the amount of MPS members have measured under the Agreement, would not address the real source of distortions, i.e., economic support. Instead, it would invite members to design policies to comply with certain limits without necessarily constraining their distorting support.

Application of the AoA MPS formula also remains controversial. As shown, for India's notified and counter-notified MPS, members can disagree substantially about the appropriate variables for calculating levels of this support. India claims MPS within its limits except for rice in recent years. In contrast, the counter-notifications about India's MPSs claim that India's use of administered prices makes those measurements greatly exceed the limits. As India's administered prices have often been below international prices, a successful challenge on excessive support would accomplish little in terms of reducing distortions. The situation for sugarcane in India is different, with India's price support being mostly positive in economic terms. In this case, acting on a Panel finding of excessive MPS under the AoA, which India has appealed, could constrain economic price support. Nonetheless, the MPS assessed by the Panel exceeds by far the economic MPS for sugarcane in the years under dispute, which raises questions about the usefulness of the measurement under the Agreement.

For these and other reasons, India and many other developing countries have argued that producer price support in the form of MPS resulting from acquisition of stocks at administered prices for food security purposes effectively be exempt from any limit on support. In the absence of a consensus, an interim mechanism is being implemented until a permanent solution is agreed and adopted. The 2013 and 2015 ministerial decisions, and the decision by the General Council in 2014, conditionally preclude a challenge of an excessive AMS resulting from acquisition of stocks at



administered prices for food security purposes in developing countries. However, this does not provide a sound basis for a permanent solution. Exempting MPS resulting from the stocks acquisition programmes from limit permanently would leave price support for major crops in developing countries unconstrained, while making a permanent exception from dispute challenge would undermine the integrity of the WTO's Dispute Settlement Understanding. Progress in negotiations on agriculture, thus, remains stymied by the impasse about accounting for MPS when stocks are acquired at administered prices for food security purposes.

This article proposes an alternative MPS measurement that retains the administered price in the measured price gap but replaces the FERP with LRP, a moving average of lagged border prices. When also counting all production as eligible production, the resulting LRP MPS would often align more closely with economic MPS than does the AoA MPS, as illustrated for wheat and rice in India during 2008-20. This would address the problematic gap that often exists between the AoA and economic measurements of MPS.

If new rules for domestic support are to be effective, they need be designed on the basis of economic realities, not merely on the often-misleading indications generated by the AoA's measurements. In particular, adoption of an LRP MPS that tracks economic MPS could provide a permanent solution to the PSH impasse, on its own and not as a secondary consideration. Economic MPS is often less than MPS measured under the AoA, especially for developing countries. Not facing the risk of having to reduce an artificially high measurement of MPS, many developing countries would find it less onerous to have producer support resulting from acquisition at administered prices of stocks for food security programmes remain subject to limit. Proponents of retaining such limits should also be reassured that the commitments to which they seek to hold members have a sound economic basis. With the impasse on accounting for MPS related to PSH programmes resolved, attention of negotiators could turn to the broader question of strengthening in a balanced manner the domestic support rules and commitments for all members. This long-term objective is envisioned in the AoA, providing for substantial and progressive reductions in agricultural support and protection to correct and prevent restrictions and distortions in world agricultural markets.